Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

DONALD R. WILD and DIANA H. ~~WILD,~~

Petitioners,

v.

SUBSCRIPTIONS PLUS, INC.; Y.E.S.! INC. a/k/a YOUTH EMPLOYMENT SERVICES, INC.; KARLEEN HILLERY; CHOAN LANE; JEREMY HOLMES; HEART OF TEXAS DODGE, INC.; SCOTTSDALE INSURANCE COMPANY; ACCEPTANCE INSURANCE COMPANY; PROGRESSIVE NORTHERN INSURANCE COMPANY; ALLSTATE INSURANCE COMPANY; UNIVERSAL UNDERWRITERS INSURANCE COMPANY and MUTUAL FIRE AND AUTOMOBILE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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43 pp.

QUESTION PRESENTED

Petitioners filed a personal injury lawsuit against multiple defendants in a federal district court in Louisiana for the death of their son, who was killed in an accident in Wisconsin. The Louisiana judge transferred the case to the federal district court in Wisconsin, pursuant to 28 U.S.C. § 1406(a) but without first determining if all defendants could be sued there. The Wisconsin judge dismissed one defendant having concluded that she was not subject to the Wisconsin court's jurisdiction. Petitioners then moved to retransfer the case to Louisiana arguing that the transfer was unlawful because the transferee court did not have jurisdiction over *all* defendants.

This case presents the following question:

Is a transfer under section 1406(a) invalid because one defendant in a multidefendant case is not subject to the transferee court's personal jurisdiction?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's opinion and order (per Crabb, C.J.) granting various motions for summary judgment (Appendix ("Pet. App.") 20a-52a) is not published. The district court's subsequent order denying petitioners' motion to retransfer the case to the transferor court (Pet. App. 16a-19a) is not published. The court of appeals' opinion (per Posner, J., joined by Flaum, C.J. and Lipez, J.) affirming (Pet. App. la-12a) is published at 292 F.3d 526.

STATEMENT OF JURISDICTION

The court of appeals issued its opinion on May 31, 2002. Petitioners did not request rehearing and/or rehearing en banc. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioners rely on and this petition involves the proper interpretation of § 1406(a) of the Judicial Code, 28 U.S.C. § 1406(a), which provides:

> The district court of a district in which is filed a case laying venue in the *wrong* division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it *could* have been brought.

STATEMENT OF THE CASE

Petitioners, Donald and Diana Wild, are the parents of Joseph Wild, a young man who was recruited in Louisiana to work as a traveling salesman, selling magazine subscriptions in towns and cities throughout the country. Joseph and several other members of his sales crew were killed in a vehicular accident in Wisconsin, while they were being transported to their hotel after a full day of work.

When petitioners filed a wrongful death action in the Eastern District of Louisiana, one of the defendants, Allstate Insurance Co. ("Allstate"), filed a motion to transfer the case to Wisconsin. The Louisiana judge, acting pursuant to 28 U.S.C. § 1406(a) but without first determining if the case "could have been brought" originally in Wisconsin, granted the motion.

Almost ten months after the transfer, several defendants filed motions for summary judgment, with one defendant, Karleen Hillery ("Hillery"), claiming there was no basis for subjecting her to the Wisconsin court's jurisdiction.

The Wisconsin judge granted all the motions. With respect to Hillery's jurisdictional motion, the Wisconsin judge erroneously placed upon petitioners "the burden of establishing personal jurisdiction over defendant Hillery" (Pet. App. 35a), even though ordinarily, the party who files a motion to transfer under § 1406(a), in this case Aetna, bears that burden. *Chrysler Credit Corp. v. County Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991); 17 *Moore's Federal Practice* § 111.33 (3d ed.). The Wisconsin judge concluded that

> . . . petitioners have not shown that defendant Hillery committed any tortious act within Wisconsin or that any other reason exists for subjecting her to personal jurisdiction. Accordingly, she will be dismissed from this case.

Petitioners filed a motion for reconsideration, which was subsequently denied.

However, while their motion for reconsideration was pending, petitioners asked the Wisconsin judge to *retransfer* the case to Louisiana because (1) prior to the transfer to Wisconsin, the Louisiana judge did not consider whether the transferee (Wisconsin) court had jurisdiction over *all* the defendants, as required by *Hoffman v. Blaski*, 363 U.S. 335 (1960) and its progeny, and (2) the Wisconsin judge had decided (on December 6, 2000, when the summary judgment motions were granted) that Hillery was *not* subject to the Wisconsin court's jurisdiction.

Petitioners argued that since the Wisconsin judge had concluded there was no reason for "subjecting [Hillery] to personal jurisdiction" (Pet. App. 35a) in Wisconsin, the Wisconsin court (1) could not exercise jurisdiction over *all* defendants, and (2) the transfer from Louisiana was unlawful because this case "could [not] have been brought" against *all* defendants in Wisconsin, as required by 28 U.S.C. § 1406(a) for a valid transfer. In short, petitioners took the position that Hillery's dismissal for lack of personal jurisdiction had established that the Wisconsin court was *not* a proper transferee court and, as such, never acquired jurisdiction over the case, requiring a retransfer.

The Wisconsin judge, while recognizing that "it does seem somewhat unfair that plaintiffs are now forced to bring a separate suit if they want to pursue Hillery" (Pet. App. 18a), denied petitioners' motion for retransfer. (Pet. App. 16a-19a).[1] The Wisconsin judge apparently believed that a transferee court acquires jurisdiction over a transferred case *even* if it does not have jurisdiction over *all* defendants:

> Just because plaintiffs cannot get personal jurisdiction over all defendants they want to sue does not mean that plaintiffs do not have a *right* to bring suit in a particular district. The fact that this court does not have personal jurisdiction over Hillery does not mean that this court does not have the jurisdiction over the case itself. (Emphasis in the original)

After other motions were granted and following petitioners' settlement with three defendants, the Wisconsin court entered an Amended Judgment. (Pet. App. 13a-15a). On petitioners' appeal, the Seventh Circuit affirmed in an opinion remarkable for its fundamental inconsistency with governing precedent of this Court and decisions of other circuits. (Pet. App. 1a-12a). In that opinion, the Seventh Circuit announced a rule that is completely at odds with the rule applied in *all* the other circuits that have considered this issue:

---

1. Petitioners' motion for retransfer preserved for appellate review the issues concerning the propriety of the original transfer and the validity of any judgment issued by the transferee court. *National Standard Co. v. Adamkus*, 881 F.2d 352, 356 (7th Cir. 1989); *Songbyrd v. Estate of Grossman*, 206 F.3d 172, 177 (2d Cir. 2000).

> But in any event we do not agree with the plaintiffs that a transfer under section 1406(a) (or the closely parallel section 1404(a), which, under the same conditions as section 1406(a), *see Van Dusen v. Barrack*, 376 U.S. 612, 622 and n.13 (1964); *Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1104 n.5 (5th Cir. 1981), permits transfers for the convenience of the parties even if venue is proper in the district in which the suit was originally filed) is invalid just because one defendant in a multidefendant case (there were 13 defendants before Hillery was dismissed) cannot be served either directly or under a long-arm statute in the transferee district . . .
>
> A multidefendant case, this multidefendant case in any case, is different . . .
>
> It is a bad result, not contemplated by Congress, and we conclude that there is no absolute bar to the transfer of a multidefendant suit to a district in which one of the defendants cannot be served . . .

(Pet. App. 7a-8a).

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. First, the issue presented in this case is of important concern to the effective administration of justice in the federal courts. The issue is one of statutory construction and about the meaning of 28 U.S.C. § 1406(a), which governs the transfer,

from one district court to another, of cases that are filed in the wrong venue. There is a need for uniform interpretation of this statute.

Second, the Seventh Circuit's decision conflicts with a controlling decision of this Court (which had effectively settled the issue) and with decisions of at least three other circuit courts. This conflict likewise involves an important question of statutory construction and is apt to have continuing future consequences. The writ should be granted to resolve *now* the conflict on this important issue.

ARGUMENT

a. The Wisconsin Court did not acquire jurisdiction over the case.

Motions to transfer cases from one district court to another are governed by 28 U.S.C. §§ 1404(a) and 1406(a). Section 1404(a) applies to a case that is originally filed in the *proper* venue:

> For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer *any* civil action to any other district or division where it *might* have been brought. (Emphasis added)

And Section 1406(a) applies if the case is originally filed in the *wrong* venue:

> The district court of a district in which is filed a case laying venue in the *wrong* division or district shall dismiss, or if it be in the interest of justice,

> transfer such case to any district or division in which it *could* have been brought. (Emphasis added)

Although the two statutes are similar, § 1406(a) uses the word "*could*," while § 1404(a) uses the word "*might*." The phrase "*where it might have been brought*" has been interpreted to mean the same as the phrase "*where it could have been brought.*" *Heinz v. Frank Lloyd Wright Foundation*, 773 F. Supp. 1219 (W.D. Wis. 1991).

The party who requests the transfer of a case from one district to another must establish that personal jurisdiction over *all* defendants can be exercised in the proposed transferee court. *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991); 17 *Moore's Federal Practice* § 111.33 (3d ed.).

Within the context of § 1404(a), this Court held in *Hoffman v. Blaski*, 363 U.S. 335 (1960) that a case can be transferred *only* to a court where plaintiff would have had a right to bring the action independent of the wishes of the defendant. In *Hoffman*, the plaintiffs

> objected to the transfer [from one district to another] because inasmuch as the defendants did not reside, maintain a place of business, or [commit the wrongful act] in, and could not have been served with process in, the [transferee] district, the courts of [the transferee] district lacked venue over the action and ability to command jurisdiction over the defendants; that therefore [the transferee] district was not a forum in which the [plaintiffs] had a right to bring the

> action, and, hence, the [transferor] court was without power to transfer it to [the transferee] district.

363 U.S. at 336-37.

This Court agreed and explained that a transferee court acquires *jurisdiction* over a *case* only through a valid transfer:

> It is not to be doubted that the transferee courts, like every District Court, had jurisdiction to entertain actions of the character involved, but it is obvious that they did not *acquire jurisdiction* over these particular actions when they were brought in the *transferor* courts. The *transferee* courts could have acquired *jurisdiction* over these actions *only if properly brought in those courts, or if validly transferred thereto under § 1404(a).*

363 U.S. at 343. (Emphasis added)

Thus, ever since this Court decided *Hoffman,* it has been clear that (1) a *proper transfer* to the *proper transferee court* is a *jurisdictional* requirement that must be satisfied before the transferee court acquires jurisdiction over a case, and (2) a case can be validly transferred under § 1404(a), and by analogy under § 1406(a), only to a court that has jurisdiction over *all* defendants.

After this Court decided *Hoffman*, at least three circuit courts read §§ 1404(a) and 1406(a) as requiring that the proposed transferee court have proper venue *and* the ability to assert *personal* jurisdiction over *all* defendants. In *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 24 (3d Cir. 1970) the Third Circuit stated that

> . . . a transfer is authorized by the statute only if the plaintiff had an "unqualified right" to bring the action in the transferee forum at the time of the commencement of the action; i.e., venue must have been proper in the transferee district and the transferee court must have had power to command jurisdiction over *all* of the defendants. *Van Dusen v. Barrack*, supra. Prior to ordering a transfer the district court must make a determination that the suit could have been rightly started in the transferee district. *Jones v. Valley Welding Supply Company*, 303 F. Supp. 9 (W.D.Pa. 1969). If there is a "real question" whether a plaintiff could have commenced the action originally in the transferee forum, *Leyden v. Excello Corporation*, 188 F. Supp. 396 (D.N.J. 1960), it is evident that he could not have an unqualified right to bring his cause in the transferee forum . . . (Emphasis added)

Similarly, in *Sharp Electronics Corp. v. Hayman Cash Register Co.*, 655 F.2d 1228, 1230 (D.C. Cir. 1981), the District of Columbia Circuit stated:

> We are aware that such a transfer [under § 1406(a)] would require the district court to decide as a *preliminary* matter that venue and jurisdiction would be proper as to *all* defendants in the [proposed transferee] district. *Hoffman v. Blaski*, 363 U.S. 335 (1960) (interpreting nearly parallel language of 28 U.S.C. § 1404(a)) . . . (Emphasis added)

Likewise, in *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1148 (5th Cir. 1984), the Fifth Circuit noted

that "[o]rdinarily transfer of a suit against *multiple* defendants is proper *only* if *all of them* would have been amenable to process in, and if venue as to all of them would have been proper in, the transferee court." The Seventh Circuit is the only appellate court that has reached a different conclusion.

All district courts that have considered the issue, except the Wisconsin court in our case, have also concluded that the transferee court must have personal jurisdiction over *all* defendants. *Mizell v. Prism Computer Corp.*, 27 F. Supp. 2d 708, 713 (S.D. Miss. 1998) ("Thus, transfer may properly be made *only* where the court to which transfer is sought would have been a proper venue and would have had personal jurisdiction over *all* the defendants if it had been the original forum"); *Watwood v. Barber*, 70 F.R.D. 1, 9 (N.D. Ga. 1976); *Schacht v. Javits*, 53 F.R.D. 321, 324 (S.D.N.Y. 1971); *Levin v. Mississippi River Corporation*, 289 F. Supp. 353, 357 (S.D.N.Y. 1968); *Alexander & Alexander, Inc. v. Donald F. Muldoon & Co., et al.*, 685 F. Supp. 346 (S.D.N.Y. 1988) (the court must have personal jurisdiction over *all* defendants); *Heinz v. Frank Lloyd Wright Foundation*, 773 F. Supp. 1219 (W.D. Wis. 1991) (Crabb, C. J.) ("The phrase 'could have been brought' in § 1406(a) requires that the proposed transferee court have proper venue and the ability to assert personal jurisdiction over the *defendants*"); *Johnson v. Helicopter & Airplane Services Corp.*, 389 F. Supp. 509 (D. Md. 1974); *Volkswagen de Mexico, S.A. v. Germanischer Lloyd*, 768 F. Supp. 1023 (S.D.N.Y. 1991); 17 Moore's Federal Practice, § 111.33 (3d ed.).

The rule is so well established that one treatise states:

> In suits against multiple defendants, transfer is proper only to a district in which *all* of the

> defendants would have been amenable to process and in which the venue would be proper for all of them. (Emphasis added)

15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3845, p. 351 (2d ed. 1986).

In our case, the Wisconsin court never acquired jurisdiction because one defendant, Hillery, is not amenable to process in Wisconsin. Once the Wisconsin court determined that Hillery could not be sued there, it should have retransferred the case to Louisiana.

b. The appellate court should have applied the law of the Fifth Circuit.

In the Fifth Circuit, "a transfer of a suit against multiple defendants is proper only if all of them would have been amenable to process in, and if venue as to all of them would have been proper in, the transferee court." *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d at 1140, 1148 (5th Cir. 1984).

Without giving any explanation, the Seventh Circuit applied its new rule — that there is no absolute bar to the transfer of a multidefendant suit to a district in which one of the defendants cannot be served — which is contrary to the Fifth Circuit's rule. However, the validity of the transfer, which was ordered by the Louisiana judge, had to be evaluated under the Fifth Circuit's law and not under the Seventh Circuit's law.

c. The Amended Judgment is null and void.

It is well established that a judgment rendered by a court that lacks jurisdiction is a nullity. *Johnson v. Zerbst*, 304 U.S. 458 (1938) (A "judgment of conviction pronounced by a court without jurisdiction is void."); *Long v. Shorebank Development Corp.*, 182 F.3d 548 (7th Cir. 1999) ("A void judgment, 'that is one entered by a court which lacks jurisdiction over the parties, the subject matter, or lacks inherent power to enter the particular judgment . . . can be attacked at any time, in any court, either directly or collaterally, provided that the party is properly before the court.'"); *Farrell v. Wyatt*, 408 F.2d 662, 664 (2d Cir. 1969); *Matter of Reitnauer*, 152 F.3d. 341, 344 n.12 (5th Cir. 1998) ("It is true that (1) jurisdictional defects render a judgment void, and (2) void judgments are subject to collateral attack.").

In our case, the Amended Judgment is null and void because it was rendered by a transferee court that never acquired jurisdiction over the case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED MAY 31, 2002

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-3406

DONALD R. WILD AND DIANA H. WILD,

Plaintiffs-Appellants,

v.

SUBSCRIPTION PLUS, INC., *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 00 C 67 — **Barbara B. Crabb**, *Chief Judge.*

ARGUED APRIL 18, 2002 — DECIDED MAY 31, 2002

Before FLAUM, *Chief Judge*, and HARLINGTON WOOD, JR., and POSNER, *Circuit Judges*.

POSNER, *Circuit Judge*. This is a personal injury suit brought by the parents of a young man killed in an accident in Wisconsin. Federal jurisdiction is based on diversity of citizenship. The suit was filed originally in a federal district court in Louisiana, but the judge there transferred the case

to a federal district court in Wisconsin, pursuant to 28 U.S.C. § 1406(a), because he determined that Louisiana was not a proper venue for suing all — or in fact any — of the defendants. The district judge in Wisconsin denied the plaintiffs' motion to retransfer the case to Louisiana and later granted motions to dismiss or for summary judgment filed by several of the defendants. The other defendants having settled, the district court entered a final judgment terminating the litigation and sparking this appeal. The principal though not only issue is the lawfulness of the transfer from Louisiana to Wisconsin; if as the plaintiffs contend it was unlawful, the motion to retransfer should have been granted.

We note initially a serious deficiency in the jurisdictional statement in the plaintiffs' brief that went unnoticed in the four briefs filed by defendants. With regard to the insurance-company defendants, the allegation of citizenship takes the following form: "Progressive Northern Insurance Company, a citizen of the State of Wisconsin, with its principal place of business in the State of Ohio." (The allegations regarding the other insurance companies are identical except for name and states.) The diversity statute states that a corporation is a citizen of both the state in which it is incorporated and the state in which its principal place of business is located. 28 U.S.C. § 1332(c)(1). If a firm is not a corporation, its citizenship is determined by the citizenship of its proprietor, partners, members, or other principals. *Carden v. Arkoma Associates*, 494 U.S. 185, 195 (1990); *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998); *Indiana Gas Co. v. Home Ins. Co.*, 141 F.3d 314, 316 (7th Cir. 1998); *Herrick Co. v. SCS Communications, Inc.*, 251 F.3d 315, 322 (2d Cir. 2001); *Schiavone Construction Co. v. City of New York*, 99 F.3d

546, 548 (2d Cir. 1996). The plaintiffs' jurisdictional statement does not allege that Progressive Insurance Company or any of the other insurance-company defendants is a corporation — though inquiry of counsel revealed that they are and that the requirement of complete diversity of citizenship is satisfied, with two possible exceptions:

The corporate charter of one of the defendants had been revoked before this suit was brought; and though the charter was later restored, jurisdiction is normally determined as of the date of the filing of the suit. The only case we can find on the precise question, and it happens to be a decision by this court, allows retroactive reinstatement to confer jurisdiction, *Costain Coal Holdings, Inc. v. Resource Investment Corp.*, 15 F.3d 733, 734 and n. 3 (7th Cir. 1994), contrary to (and without discussing) the general principle (an exception is discussed below) that jurisdiction is determined as of the date of the suit; and on that date, before reinstatement, the corporation had no corporate charter.

An approach consistent with the general principle, but which leads to the same result in this case as the approach in *Costain* would, makes the question of what state a corporation is a citizen of if its corporate charter has been revoked depend on the status of such an entity under the law of the state that granted (and later revoked) the charter. Most states sensibly permit a corporation whose charter has been revoked to continue nevertheless to operate as a corporation, specifically for purposes of suing and being sued, until it is actually dissolved. See, e.g., *Paper Systems Inc. v. Mitsubishi Corp.*, 193 F.R.D. 601, 607-08 (E.D. Wis. 2000); *Clipper Air Cargo, Inc. v. Aviation Products Int'l, Inc.*,

981 F. Supp. 956, 958-59 and n. 3 (D.S.C. 1997); *Illinois Central Gulf R.R. v. Arbox Three Corp.*, 700 F. Supp. 389, 390-91 (N.D. Ill. 1988). Oklahoma, the state of incorporation of the defendant in question (Subscription Plus), is one of those states. 18 Okla. Stat. § 1099; *Polk v. Unknown Trustees, Successors & Assigns of Three-In-One Oil & Gas Co.*, 298 P.2d 432, 435-36 (Okla.1956) (per curiam). And, for icing on the cake, Oklahoma also has a statute making reinstatement of a corporation's charter retroactive. 18 Okla. Stat. § 1120(E). We conclude that the revocation of Subscription Plus's corporate charter did not affect its status for diversity purposes.

The complaint describes another defendant, Mutual Fire and Automobile Insurance Company, as a "foreign insurer authorized to conduct business in Louisiana" — which says nothing about where its principal place of business is (or its state of incorporation, but we have learned that it is Ohio, an answer that does not destroy complete diversity). In the plaintiffs' brief on appeal, Mutual is described as "a citizen of a state other than Louisiana, with its principal place [of business?] in a State other than Louisiana." But how can the plaintiffs know that the company's principal place of business is not in Louisiana if they don't know where its principal place of business is? We doubt that the plaintiffs conducted a census of all businesses whose principal place of business is in Louisiana and discovered that Mutual Fire and Automobile Insurance Company is not one of them. No matter. The company was later dropped as a party, and under *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837 (1989), a want of complete diversity can be cured by dropping the party that made diversity incomplete.

Appendix A

With subject-matter jurisdiction secure, we turn to the transfer issue and the merits, first sketching in the factual background.

Subscription Plus, owned and operated by a woman named Karleen Hillery, is engaged in the business of processing magazine subscriptions. It contracted with Y.E.S.!, a sales agency, to secure magazine subscriptions for Subscription Plus. The Wilds' son Joseph was a salesman employed by Y.E.S.! The Wilds live in Louisiana, and Joseph Wild was hired there.

The salesmen would travel in groups in vans to various states to sell subscriptions. Y.E.S.!'s owner, Lane, bought a green van and employed a man named Holmes to drive it. (The color turns out to be relevant, as we'll see later but can ignore for now.) While driving the sales crew in Wisconsin after a day of door-to-door subscription selling, Holmes, noticing that he was being pursued by a police car and not having a valid driver's license, tried to switch seats with one of the passengers, lost control, and crashed the van. Seven members of the sales crew, including young Wild, were killed and the others injured. Suits were brought on behalf of all the victims except Wild in a Wisconsin state court, where the suits were consolidated and are pending. Besides suing Hillery, Lane, Holmes, Subscription Plus, Y.E.S.! and the dealership that sold the van, the Wilds sued the liability insurers of these defendants; it could do this because Louisiana, like Wisconsin, is a direct-action state, meaning that a tort plaintiff can sue his injurer's liability insurer as well as the injurer.

Appendix A

Section 1406(a) of the Judicial Code provides that if a suit is brought in a district that is not a proper venue under 28 U.S.C. § 1391, the judge can transfer it to any district "in which it could have been brought." The district judge in Louisiana found that venue in this diversity suit was not properly laid in Louisiana because none of the defendants resided there or could be served there (or elsewhere under Louisiana's long-arm statute) and "a substantial part of the events or omissions giving rise to the claim" had not taken place there either. 28 U.S.C. § 1391(a)(2). There is no serious contention that the judge erred in this ruling or that the Western District of Wisconsin is not a district in which venue can be laid, at least with regard to most of the defendants (and possibly all, as we're about to see). The accident occurred there, and it is clearly the most convenient site for the litigation. All the other suits growing out of the accident have been consolidated there, and while there is no procedure for consolidating those suits with the Wilds' suit because those suits are in state court and the Wilds' suit is in federal court, at least the defendants — who are the same in all the suits, including the Wilds' suit — can localize their defense efforts to one state, minimizing travel time for their lawyers.

The only basis for the motion to retransfer the case was that the district judge had ruled that Hillery could not be served under Wisconsin's long-arm statute, thus forcing the Wilds, unless the case was retransferred, to split their suit between Wisconsin (all the defendants except Hillery) and Louisiana (Hillery). After the judge ruled, the Wilds did bring a suit against Hillery in Louisiana, but it was promptly transferred to Wisconsin (and is pending before the same district judge), because in the interim a Wisconsin state court ruling in one of the cases arising from the accident interpreted

Wisconsin's long-arm statute in a way that makes clear that Hillery is within the statute's reach after all. *Forgues v. Heart of Texas Dodge, Inc.*, No. 99CV0952, slip op. at 2 (Wis. Cir. Ct. Nov. 5, 2001). Although an unpublished opinion of a trial court, and so hardly an authoritative guide to the law of Wisconsin, the parties do not question its soundness.

It is very difficult in these unusual circumstances to get excited about the prospect of bouncing this three-year-old case back to Louisiana, but cf. *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 24 (3d Cir.1970), even apart from the fact that, since venue cannot be laid in Louisiana, the case would have to be dismissed or transferred elsewhere. Supposing the district judge had gotten Wisconsin law right when she ruled on Hillery's motion to dismiss for want of personal jurisdiction (that is, supposing she had anticipated the decision in *Forgues*), Hillery would be a party to the present case and the claim against her, which is indistinguishable from that against her company, Subscription Plus, would have gone down the drain with that claim. As it is, the claim against her remains alive in the district court — if barely, since the defendants have moved to dismiss it as barred by res judicata. Still, the plaintiffs are no worse off, or, in any practical sense, differently situated, than if the district judge had not mistakenly dismissed Hillery, thus raising the retransfer issue.

But in any event we do not agree with the plaintiffs that a transfer under section 1406(a) (or the closely parallel section 1404(a), which, under the same conditions as section 1406(a), see *Van Dusen v. Barrack*, 376 U.S. 612, 622 and n. 13 (1964); *Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1104 n. 5 (5th Cir. 1981), permits transfers for the convenience of the parties even if venue is proper in the

district in which the suit was originally filed) is invalid just because one defendant in a multidefendant case (there were 13 defendants before Hillery was dismissed) cannot be served either directly or under a long-arm statute in the transferee district. Were there only one defendant and he or she could not be served there, it would be plain that the suit "could not be brought" there and so transfer would be improper. *Van Dusen v. Barrack*, *supra*, 376 U.S. at 621; *Ellis v. Great Southwestern Corp.*, *supra*, 646 F.2d at 1107; 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3827, pp. 274-75 and n. 30 (2d ed. 1986). For consider the implications: *A* sues *B* in a district in which venue is improper, meaning (among other things) that *B* does not reside and cannot be served there, and the court transfers the case to *another* district in which *B* does not reside (in which event *B* could be served) and cannot otherwise be served; it would be absurd to permit such a transfer. The suit should instead be dismissed and *A* forced to sue *B* somewhere *B* can be served.

A multidefendant case, this multidefendant case in any case, is different. The 13 defendants are scattered all over the United States. There is (or so the district judge believed when she denied the retransfer back to Louisiana) no federal district in which all could be served. If the case could not have been transferred from Louisiana to Wisconsin, it could not have been transferred anywhere, which means it would have had to be dismissed in its entirety because Louisiana was not a proper venue for any of the defendants, and the Wilds forced to sue maybe in 13 different districts or states. This result would be contrary to the purpose of section 1406(a), which introduced transfer as an alternative to dismissal. As the Supreme Court explained in *Goldlawr, Inc.*

v. Heiman, 369 U.S. 463, 466 (1962), "the problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn. Indeed, this case is itself a typical example of the problem sought to be avoided, for dismissal here would have resulted in plaintiff's losing a substantial part of its cause of action under the statute of limitations. . . . The language and history of § 1406(a) . . . show a congressional purpose to provide as effective a remedy as possible to avoid precisely this sort of injustice." That is the result for which the Wilds (paradoxically and opportunistically, since they are the plaintiffs) contend.

It is a bad result, not contemplated by Congress; and we conclude that there is no absolute bar to the transfer of a multidefendant suit to a district in which one of the defendants cannot be served. But that leaves the question whether a defendant in a multidefendant suit who cannot be served can be forced to defend in the transferee district or, as most cases hold, must be severed from the rest of the suit and the suit against him either dismissed or (better, to avoid the running of the statute of limitations) transferred back to the district in which the suit was first filed or to a district in which service upon him is possible. *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1148 (5th Cir. 1984); *Sharp Electronics Corp. v. Hayman Cash Register Co.*, 655 F.2d 1228, 1230 (D.C.Cir. 1981) (per curiam); *Relf v. Gasch*, 511 F.2d 804, 807-08 and n. 13 (D.C. Cir. 1975); *Shutte v. Armco Steel Corp.*, *supra*, 431 F.2d at 24; 15 Wright, Miller & Cooper, *supra*, § 3845, pp. 351-53 (2d ed. 1986 & 2002

Supp.). The argument for the latter course, nowhere made in the notably sparse discussions in the cases, is that the transfer statutes do not purport to alter the rules governing personal jurisdiction; and of course the outer bounds of those rules are set by the Constitution. At all events, by dismissing Hillery from the suit, the district judge did what the case law permits.

We move on to the merits, where we can be brief. The non-settling defendants are Subscription Plus, the dealership that sold the van to Lane, and several of the insurance companies. Since Y.E.S.! was an independent contractor of Subscription Plus, the Wilds could not impute the negligence (or worse) of Holmes, Y.E.S.!'s employee, to Subscription Plus. *Wagner v. Continental Casualty Co.*, 421 N.W.2d 835, 844 (Wis. 1988); *Snider v. Northern States Power Co.*, 260 N.W.2d 260, 261 (Wis. 1977); *Giffin v. Poetzl*, 634 N.W.2d 901, 905 (Wis. App. 2001); *Sullivan v. Freeman*, 944 F.2d 334, 336 (7th Cir. 1991). There are a number of exceptions to the rule that a principal is not liable for the torts of his independent contractors, but, as explained at length by the district judge, none of them is applicable to this case. And anyway if Holmes had been an employee of Subscription Plus, he would be subject to Wisconsin's workers' compensation law, which preempts tort claims by employees against their employers.

The claim against the dealership is completely frivolous. Lane when he bought the van showed the dealer a valid driver's license and proof of insurance. The dealer had no reason to think Lane would entrust the van to a person who did not have a valid driver's license and was reckless; and so no negligence can be attributed to the dealer. *Bankert*

by Habush v. Threshermen's Mutual Ins. Co., 329 N.W.2d 150, 153 (Wis. 1983); *Halverson by Boles v. Halverson*, 541 N.W.2d 150, 153 (Wis. App. 1995); *Joyce v. Joyce*, 975 F.2d 379, 385 (7th Cir. 1992).

That leaves only the insurance companies. Two of them, Acceptance and Scottsdale, were the liability insurers of Subscription Plus and of Hillery, respectively. Wisconsin permits a direct action regardless of whether the insured is a party, but only if the insurance policy was issued or delivered in Wisconsin, *Kenison v. Wellington Ins. Co.*, 582 N.W.2d 69, 73 (Wis. App. 1998); *Lexington Ins. Co. v. Rugg & Knopp, Inc.*, 165 F.3d 1087, 1092 (7th Cir. 1999) (Wisconsin law), which neither of these policies was. Otherwise the direct action can be maintained only if and so long as the insureds remain parties. See Wis. Stat. §§ 631.01(1), 632.24; *Kenison v. Wellington Ins. Co.*, *supra*, 582 N.W.2d at 73. Both Subscription Plus and Hillery were properly dismissed, and out with them went their two insurers.

Progressive was Lane's insurer; Lane, remember, owned the van that crashed as well as owning and controlling Y.E.S.!, which operated the van. But here is where color becomes significant. The van was green; but the policy was written to cover a white van that had been purchased earlier but was out of service. The green van was bought in January 1999; the policy on the white van became effective on March 5; and the accident occurred on March 25. The policy provides coverage for replacement vehicles but only "for a period of not greater than 30 days without notification to us." The purpose is to enable the policy holder to obtain coverage without having to buy a separate policy while enabling the insurance company to adjust the premium retroactively to reflect any

greater risk created by the substitution. *Lewis v. Bradley*, 97 N.W.2d 408, 411 (Wis. 1959); *Rabatie v. U.S. Security Ins. Co.*, 581 So.2d 1327, 1329-30 (Fla.App.1989) (en banc) (per curiam). The plaintiffs argue that the 30 days did not begin to run until March 5, even though the replacement vehicle had been in service for more than a month before then. We think that either the green van was never covered, either because it was acquired before the policy took effect, see *United Farm Bureau Mutual Ins. Co. v. Elder*, 427 N.E.2d 127, 129 (Ill. 1981); *Patrick v. Thines*, 590 N.E.2d 850, 852 (Ohio App. 1990); cf. *Offerdahl v. Glasser*, 93 N.W.2d 362, 363 (Wis. 1959), or because it was in service for more than 30 days without notification to the company; or that, at the very least, notification was due at the time the policy took effect. An insurance company does not want to insure indefinitely a vehicle of which it has no knowledge whatever.

The deficiency in the parties' jurisdictional statements is inexcusable, just as in *Cincinnati Ins. Co. v. Eastern Atlantic Ins. Co.*, 260 F.3d 742, 747-48 (7th Cir. 2001), where we reprimanded the lawyers for both sides. As in that case, so in this one, the lawyers disregarded an utterly clear jurisdictional provision, here regarding the citizenship of corporations, and are hereby reprimanded.

AFFIRMED.

A true Copy:
Teste:

s/
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN DATED AUGUST 20, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

AMENDED
JUDGMENT IN A CIVIL CASE

Case No.: 00-C-67-C

DONALD R. WILD and DIANA H. WILD,

Plaintiff(s),

vs.,

SUBSCRIPTIONS PLUS, INC., Y.E.S.! INC., YOUTH EMPLOYMENT SERVICES, INC., KARLEEN HILLERY, CHOAN A. LANE, JEREMY HOLMES, HEART OF TEXAS DODGE, INC., SCOTTSDALE INSURANCE COMPANY, ACCEPTANCE INSURANCE COMPANIES, PROGRESSIVE NORTHERN INSURANCE COMPANY, MUTUAL FIRE AND AUTOMOBILE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, and UNIVERSAL UNDERWRITERS OF TEXAS,

Defendant(s).

This action came for consideration before the court with U.S. DISTRICT JUDGE BARBARA B. CRABB presiding. The issues have been considered and a decision has been rendered.

Appendix B

IT IS ORDERED AND ADJUDGED

that the motions for summary judgment filed by defendants Karleen Hillery, Heart of Texas Dodge, Inc. and Universal Underwriters of Texas are GRANTED and they are dismissed from the case. The motion for summary judgment filed by defendant Subscriptions Plus is GRANTED with respect to plaintiffs' breach of agreement and negligence claims against this defendant.

IT IS ORDERED AND ADJUDGED that defendant Acceptance Insurance Companies' motion for summary judgment is DENIED as moot because plaintiffs have no viable claims against this defendant's insureds, and the motion of Scottsdale Insurance Company to dismiss the complaint as to it is GRANTED.

IT IS ORDERED AND ADJUDGED that the motion for summary judgment of defendant Progressive Northern Insurance Company is GRANTED and Progressive Northern is relieved of its duty to defend and indemnify defendants Subscription Plus and Karleen Hillery.

IT IS ORDERED AND ADJUDGED that any and all claims asserted by plaintiffs Donald R. Wild and Diana H. Wild against defendants Choan A. Lane and Jeremy Holmes are hereby DISMISSED without taxation of costs and without prejudice and any and all claims asserted by plaintiffs Donald R. Wild and Diana A. Wild against defendant Allstate Insurance Company are hereby DISMISSED with prejudice and without taxation of costs.

Appendix B

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs' motion for default judgment against defendant Y.E.S. Inc. is GRANTED. Default judgment is entered in favor of plaintiffs jointly and against defendant Y.E.S., Inc., in the amount of $350,000.00 and this case is CLOSED.

Approved as to form this this 17th day of August, 2001.

s/ Barbara B. Crabb
BARBARA B. CRABB,
U.S. DISTRICT JUDGE

s/ Joseph W. Skupniewitz
Joseph W. Skupniewitz, Clerk of Court

AUG 20, 2001
Date

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN DATED JANUARY 10, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ORDER
00-C-0067-C

DONALD R. WILD and DIANA H. WILD,

Plaintiffs,

v.

Y.E.S.!, INC., YOUTH EMPLOYMENT SERVICES, INC., CHOAN LANE, JEREMY HOLMES, PROGRESSIVE NORTHERN INSURANCE COMPANY, MUTUAL FIRE AND AUTOMOBILE INSURANCE COMPANY, and ALLSTATE INSURANCE COMPANY,

Defendants.

On January 5, 2000, plaintiffs filed a motion to remand or transfer this case to the Eastern District of Louisiana on the ground that this court lacked jurisdiction to continue to hear the case. Plaintiffs assert that because this court does not have personal jurisdiction over defendant Hillery, it cannot be considered a district in which the case "could have been brought." Plaintiffs contend that this case was transferred improperly under 28 U.S.C. § 1406(a). Because I find that this court does have jurisdiction over the case, I will deny plaintiffs' motion.

Appendix C

Plaintiffs rely heavily on *Hoffman v. Blaski*, 363 U. S. 335 (1960), a case in which the Supreme Court construed the 28 U.S.C. § 1404(a) phrase "might have been brought" to mean a district where the plaintiff could have commenced an action at the outset, independently of the wishes of the defendant. *See id.* at 343-44. Although the *Hoffman* court discusses the language of § 1404 (a) and not of § 1406(a), the two phrases "might have been brought" and "could have been brought" have the same meaning. *See Heinz v. Frank Lloyd Wright Foundation*, 773 F.Supp. 1219, 1225 (W.D. Wis. 1991). In *Hoffman*, the Supreme Court held that two Seventh Circuit district courts did not properly transfer cases to other districts under § 1404(a) because the plaintiffs did not have the *right* to bring the cases in the transferee districts. *See Hoffman*, 363 U.S. at 344. In both of the underlying cases, venue did not lie in the transferee courts. Although the defendants, who had moved for the transfers, had waived venue in both cases, the Supreme Court held that the plaintiffs would not have had the right to commence their actions in the transferee districts. *See id.* Therefore, the cases should not have been transferred there.

Plaintiffs rely also on *Heinz*, 773 F.Supp. 1219, a case from this court for the proposition that the transferee court must have personal jurisdiction over the defendants. This case is distinguishable from *Heinz*. Although plaintiffs quote helpful language from *Heinz*, in that case there was only one defendant, so transferring the case to a district that did not have personal jurisdiction over the defendant would have had the effect of dismissing the claim. In this case, several defendants remain subject to suit. In addition, *Heinz* involved the consolidation of two related cases. This court determined

that it was in the "interest of justice" to transfer both cases to the same district because such a transfer would enhance the efficient administration of the federal court system. *See id.* at 1225. Such factors include "ensuring a speedy trial, trying related cases together, and having the trial before a judge who is familiar with the law." *Id.* The factors cited in *Heinz* reinforce the conclusion that this case was transferred properly to this district.

Although it does seem somewhat unfair that plaintiffs are now forced to bring a separate suit if they want to pursue Hillery, plaintiffs' motion must fail. First, this court has jurisdiction over this action. Unlike in *Hoffman*, plaintiffs had the right to bring the suit in this district at the outset: subject matter jurisdiction is present, personal jurisdiction exists over some defendants and venue is proper. Just because plaintiffs cannot get personal jurisdiction over all defendants they want to sue does not mean that plaintiffs do not have a *right* to bring suit in a particular district. The fact that this court does not have personal jurisdiction over Hillery does not mean that this court does not have jurisdiction over the case itself.

Moreover, plaintiffs have not alleged that personal jurisdiction over Hillery exists in the Eastern District of Louisiana, the transferor court. Therefore, even if plaintiffs were correct that the Western District of Wisconsin is not a district in which this suit could have been brought, they have failed to demonstrate that a remand or transfer to Louisiana would enable them to sue all defendants in one district.

Second, §§ 1404(a) and 1406(a) allow for transfers "in the interest of justice." It is in the interest of justice not to transfer this case back to Louisiana. Multiple civil and criminal cases arising from the accident at issue are being tried in this district and in local state court. Grouping all of the related cases in one geographical area allows the parties involved in multiple lawsuits to prepare their cases efficiently. Also, the transfer enhances the efficient administration of the federal court system. Because this court has before it a similar case arising from the same accident, denying the transfer to Louisiana allows related cases to be tried together before a judge who is familiar with the facts and the law. *See id.* Transferring the case back to Louisiana would further undermine the interests of justice because doing so would greatly delay the trial. Finally, plaintiffs have not lost the ability to bring suit against defendants whom this court has dismissed. Nothing prevents plaintiffs from filing suit against those defendants in a district where personal jurisdiction exists.

ORDER

IT IS ORDERED that the motion of Donald R. Wild and Diana H. Wild to remand or transfer the case back to the Eastern District of Louisiana is DENIED.

Entered this 10th day of January, 2001.

BY THE COURT:

s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN DATED DECEMBER 6, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

OPINION AND ORDER

00-C-67-C

DONALD R. WILD and DIANA H. WILD,

Plaintiffs,

v.

SUBSCRIPTIONS PLUS, INC., Y.E.S:! INC., YOUTH EMPLOYMENT SERVICES, INC., KARLEEN HILLERY, CHOAN A. LANE, JEREMY HOLMES, HEART OF TEXAS DODGE, INC., SCOTTSDALE INSURANCE COMPANY, ACCEPTANCE INSURANCE COMPANIES, PROGRESSIVE NORTHERN INSURANCE COMPANY, MUTUAL FIRE AND AUTOMOBILE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, and UNIVERSAL UNDERWRITERS OF TEXAS,[1]

Defendants.

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1. Originally, plaintiffs sued Universal Underwriters Insurance Company. The proper defendant is actually Universal Underwriters of Texas, which issued one of the insurance contracts in dispute. I have amended the caption accordingly.

Appendix D

In this civil action for monetary relief, plaintiffs Donald R. Wild and Diana H. Wild contend that the negligence of each of the defendants caused the death of their son Joseph in a van crash on March 25, 1999. Jurisdiction is present under § 1332, diversity of citizenship. Presently before the court are three motions for summary judgment filed by the following defendants: (1) Subscription Plus, Inc. and Karleen Hillery; (2) Acceptance Insurance Companies; and (3) Heart of Texas Dodge, Inc. and Universal Underwriters of Texas.

Defendant Hillery contends that Wisconsin does not have personal jurisdiction over her and therefore she must be dismissed from this case. In addition, both she and defendant Subscription Plus assert that each of plaintiffs' claims against them fails as a matter of law. Defendant Acceptance argues that its policy does not provide coverage for injuries arising from the accident. Finally, defendants Heart of Texas and Universal argue both that Universal's insurance policy does not cover that accident and that as a matter of law Heart of Texas cannot be held liable for Joseph Wild's death.

The motions for summary judgment filed by defendants Hillery, Subscriptions Plus, Heart of Texas and Universal will be granted. First, plaintiffs have failed to show that this court can exercise personal jurisdiction over defendant Hillery. Furthermore, the parties' proposed findings of fact raise no issue of fact from which a reasonable jury could find in favor of plaintiffs on their claims against defendants Subscriptions Plus, Hillery, Heart of Texas and Universal. As an insurer of Subscriptions Plus and Hillery, defendant Acceptance could be liable only to the extent Subscriptions Plus and Hillery were found liable. With the dismissal of the

negligence claims against these defendants, Acceptance's motion for summary judgment will be denied as moot. However, defendant Subscriptions Plus will not be dismissed from the case in all respects because defendant Progressive Northern Insurance Company has filed a cross claim against defendant Subscriptions Plus requesting declaratory relief regarding its duty to defend.

Before I set forth the undisputed facts, a word is required regarding their source. In an order dated September 19, 2000, dkt. #47, at 2, the parties were advised that responses to motions for summary judgment were to be "filed and served" by October 23, 2000.

Because many extensions had been granted previously, the order further stated, "No further extensions of the summary judgment deadline will be granted for any party for any reason."

Plaintiffs failed to file either a brief or proposed findings of fact before the order's October 23 deadline in response to the three summary judgment motions that were filed. There is no excuse for plaintiffs' untimeliness. They were well aware of the deadline and were quick to make sure deadlines were strictly enforced against other parties. Earlier in October, plaintiffs brought a successful motion to strike defendant Progressive's motion for summary judgment when it was filed several days after the October 2 deadline.

It is disingenuous for plaintiffs to say that they "erroneously believed" only service (rather than service *and* filing) was required by October 23. The September 19 order stated

explicitly that both service and filing were required. Furthermore, in urging the court to strike defendant Progressive's motion, plaintiffs argued that the motion should be stricken because it had been *filed* (not served) after the deadline, demonstrating that plaintiffs were aware that both were required. Regardless, I rejected defendant Progressive's argument that it should have been excused for untimeliness because it was confused about the deadline. I cannot hold one party strictly accountable for deadlines and excuse others. Accordingly, both plaintiffs' briefs and proposed findings of fact in opposition to the various motions for summary judgment will be stricken.[2] (As a practical matter, this ruling makes little difference to the outcome of the motions. In many instances, plaintiffs' responses to the moving defendants' proposed facts are inadequate to put the proposed facts in dispute even if they had been considered.)

Under this court's procedures, unless the non-movant places a factual proposition of the movant into dispute, the court will conclude that there is no genuine issue as to the

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2. Just as this opinion was about to be released, I received a letter from defendant Acceptance Insurance Companies stating that it was withdrawing its motion to strike plaintiffs' brief for being untimely. Defendant Acceptance's motion was filed over a month ago and Acceptance has indicated no reason why it wishes to withdraw it now. Therefore, defendant Acceptance's eleventh hour withdrawal will be disregarded. Furthermore, regardless whether defendant Acceptance is moving to strike plaintiffs' submissions (and I note that it asked to withdraw its motion to strike plaintiffs' brief only, suggesting it wished to maintain its motion to strike plaintiffs' proposed findings of fact), those submissions were untimely nonetheless. Even if defendant Acceptance's withdrawal was to be considered, then, plaintiffs' submissions would still be stricken.

finding of fact proposed initially by the movant. Therefore, except to the extent that proposed findings of defendants were put into dispute by another defendant, all properly supported findings of fact proposed by defendants will be accepted as true for the purpose of deciding the motions for summary judgment.

From the parties' proposed findings of fact, I find the following facts are undisputed.

UNDISPUTED FACTS

A. The Parties

Plaintiffs Diana H. Wild and Donald R. Wild are citizens of Louisiana and are the parents of Joseph Wild, who was killed in a van accident on March 25, 1999. Defendant Subscriptions Plus, Inc. is an Oklahoma corporation that was in the business of operating a clearing and processing company for magazine subscriptions. Defendant Karleen Hillery is a citizen of Illinois and the owner and president of Subscriptions Plus. Defendants Scottsdale Insurance Company provided commercial general liability insurance to defendants Hillery and Subscriptions Plus. Defendant Acceptance Insurance Companies provided excess insurance to these defendants and defendant Progressive Northern Insurance Company provided them auto insurance. Defendant Scottsdale is an Ohio corporation; defendant Acceptance is a Nebraska corporation; and defendant Progressive is a Wisconsin corporation.

Appendix D

Defendant Y.E.S.! Inc., or Youth Employment Services, was one of ten or eleven sales crews in 1999 throughout the country that sold the magazine subscriptions processed by Subscriptions Plus. Defendant Choan Lane, a citizen of Iowa, was the manager of Y.E.S.! Inc. Joseph Wild was a salesperson in the Y.E.S. crew.

Defendant Heart of Texas Dodge, Inc. is a Texas corporation engaged in the business of selling motor vehicles in the State of Texas. Defendant Universal Underwriters of Texas is a Texas corporation that issued an insurance policy to Heart of Texas.

B. *Relationship of Subscriptions Plus, Inc., Karleen Hillery, Y.E.S.! Inc., Choan Lane, and Joseph Wild*

1. *Subscription Plus/Karleen Hillery's relationship with Choan Lane/Y.E.S.!, Inc.*

On January 1, 1998, defendant Y.E.S./Lane and Subscriptions Plus signed a contract with each other titled "Independent Distributor Agreement." Under the agreement, which was in effect at the time of the accident, defendant Y.E.S./Lane was to "solicit and secure" magazine subscription orders for defendant Subscriptions Plus. Defendant Y.E.S./Lane was to receive 50% of each magazine order submitted. From his share of the order, defendant Lane paid for his own expenses as well as for the compensation of his sales crew.

Periodically, using defendant Subscriptions Plus's Federal Express account, defendant Lane would send the orders back to defendant Subscriptions Plus along with any checks he received.

Appendix D

The agreement provided that the relationship between defendants Subscriptions Plus and Y.E.S./Lane would be that of an "independent contractor." Further, the agreement provided:

> DISTRIBUTOR IS ENGAGED IN AN INDEPENDENT BUSINESS, AND IS SOLELY RESPONSIBLE FOR THE OPERATION AND CONDUCT OF AGENTS, CONTRACTORS, SOLICITORS, OR REPRESENTATIVES. SUB. PLUS HAS NO RIGHT OR AUTHORITY TO DIRECT, CONTROL, OR OTHERWISE INTERFERE WITH DISTRIBUTOR'S BUSINESS, AND SHALL NOT PROVIDE A BUSINESS PREMISES OR PLACE FOR DISTRIBUTOR TO CONDUCT BUSINESS. DISTRIBUTOR IS FREE TO (A) ESTABLISH ITS OWN SALES METHODS; (B) OBTAIN SALES LEADS IN ANY LAWFUL MANNER; (C) SELECT ITS OWN CUSTOMERS; (D) ESTABLISH A BUSINESS PREMISES UNDER ANY TRADE NAME; (E) CONDUCT BUSINESS FROM ANY LOCATION, AND; (F) DISTRIBUTOR SHALL BE SOLE [sic] RESPONSIBLE FOR ALL ITS OWN EXPENSES, INCLUDING LICENSE FEES, TAXES, AND COMMISSIONS, BONUSES, OR OTHER REMUNERATION PAYABLE TO DISTRIBUTOR'S EMPLOYEES, AGENTS, CONTRACTORS, SOLICITORS, OR REPRESENTATIVES.

Appendix D

Although the agreement permitted defendant Y.E.S./Lane to choose where in the United States it would sell magazine subscriptions, once a week defendant Lane would call defendant Subscriptions Plus collect to inform it of his crew's location.

The agreement could be terminated by either party at any time and defendant Y.E.S./Lane could choose to have its magazine orders processed by another company. After defendant Subscriptions Plus terminated its agreement with defendant Y.E.S./Lane in May 1999, Lane's business processed its magazines through someone else.

Under the terms of the agreement, defendant Subscriptions Plus retained some control over defendant Y.E.S./Lane. For instance, the agreement stated several terms and conditions with which magazine orders had to comply before defendant Subscriptions Plus would accept them, including that they "be evidenced by written agreement," that they comply with the law and that they be completely and accurately filled out. The agreement directed defendant Y.E.S./Lane more generally "to comply with all present and future laws" and "not to engage in any unfair trade or selling practice, to make no false or misleading presentation, and to deal honestly and fairly with the public." In accordance with this provision, defendant Subscriptions Plus would not clear an order if the distributor was violating the law and it told independent distributors not to hire anyone under the age of eighteen. In addition, defendant Subscriptions Plus expected distributors to follow the code of ethics of the National Field Selling Association, a non-profit organization for sales.

Appendix D

Some of the "day-to-day business practices" of the agreement varied from the express terms of the independent distributor agreement. For instance, defendant Subscriptions Plus provided several services to defendant Y.E.S./Lane and its other distributors that were not provided for in the agreement. One of these involved paying the distributors' personal debts. When defendant Y.E.S./Lane sent the checks that new subscribers had written back to defendant Subscriptions Plus, Subscriptions Plus would calculate how much was owed by defendant Y.E.S./Lane. If the amount of checks was worth more than what was owed, defendant Subscriptions Plus would record the excess amount and credit it to defendant Y.E.S./Lane. If requested by defendant Lane or another distributor, defendant Subscriptions Plus would use the money credited to pay bills for the distributor. Sometimes defendant Subscriptions Plus would do this even if the distributor had nothing credited to him at the time, letting the distributor work off the balance later.

Defendant Subscriptions Plus allowed defendant Lane to have his mail sent to defendant Subscriptions Plus, which would forward it to him.

The express terms of the independent distributor agreement were not always followed, at least in defendant Y.E.S./Lane's case. Although defendant Y.E.S./Lane's agreement with defendant Subscriptions Plus provides that Y.E.S./Lane would receive 50% of the sales that it made, it actually received 35% or less as the result of a verbal agreement.

Appendix D

Defendant Y.E.S./Lane used the name Subscriptions Plus in a number of circumstances. When signing into motels with the sales crew, defendant Lane would sign in as "Y.E.S./Subs. Plus" or "Subscriptions Plus, Inc." This may not have been authorized by defendant Subscriptions Plus. Also, when defendant Lane obtained the van from defendant Heart of Texas Dodge, Inc., he wrote that he was employed by both Y.E.S. and Subscriptions Plus.

2. *Subscription Plus's contacts with Joseph Wild and the sales crew*

Defendant Subscriptions Plus maintained a website that included information on becoming a magazine salesperson. Those interested could send information to defendant Subscriptions Plus via the internet. Generally, when defendant Subscriptions Plus received this information, it forwarded the information to the distributor nearest to the location of the applicant.

No members of the sales crew received any tax document from defendant Subscriptions Plus. Defendant Subscriptions Plus imposed no sales quotas on the salespeople. However, defendant Subscriptions Plus kept records of each salesperson's sales performance. When defendant Lane sent subscription orders to defendant Subscriptions Plus, he included the names of the salespeople and the number of sales. In addition, defendant Subscriptions Plus published a newsletter that it distributed to each of the sales crews in which it identified the standing of each salesperson and top sellers for each crew.

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The newsletter contained a list of "points" that each salesperson had accumulated as part of an incentive program for salespeople that promised prizes such as trips for salespeople having the most points. Defendant Subscriptions Plus would dock points from salespeople when their order forms did not conform to its procedures. For example, it would dock points if the orders had been altered, if they were illegible or had an incomplete address. The newsletter advised salespeople that if they altered checks, they could face "[t]ermination/possible arrest."

Subscriptions Plus did not provide any tools or supplies to the salespeople. However, defendant Subscriptions Plus's name and address appeared on the sales forms that the salespeople used to take orders. The receipt that salespeople gave to customers listed a name and phone number only for defendant Subscriptions Plus. Finally, salespeople were authorized to sell only those magazines listed by Subscriptions Plus and only at the prices that defendant Lane gave them.

Like the distributors, members of the sales crew could use defendant Subscriptions Plus as an address where their mail could be sent. Defendant Subscriptions Plus would then forward the mail to defendant Lane, who would distribute the mail.

Two members of the Y.E.S. salescrew, Devann Stehm and Kaila Gillock, believed their employer to be defendant Subscriptions Plus and thought that defendant Hillery was their boss. Although there is no indication that distributors complied with defendant Hillery's requests or believed they had to, defendant Hillery would tell distributors to "get rid of" salespeople that were not selling up to expectations.

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3. *Relationship of Joseph Wild and the sales crew with Y.E.S.! Inc./Choan Lane*

Each of the Y.E.S. salespeople was selected by defendant Y.E.S./Lane. Defendant Holmes sometimes did the interviewing and hiring. Some members of the Y.E.S. crew had signed independent contractor agreements with defendant Y.E.S., but some of the salespeople had no written employment agreements of any kind. Whether or not there was a written agreement does not appear to have affected the actual relationship between defendant Y.E.S./Lane and a salesperson.

Defendant Lane determined where in the United States the crew would sell and how long the crew would remain in a particular location. On at least one occasion in January 1999, the Y.E.S. sales crew traveled with Ultimate Power, another group selling magazines that were processed by Subscriptions Plus.

Defendant Lane decided each day the area where the crew would sell; salespeople had no input into this decision. The driver would drop each salesperson off at a specific location for about two hours, after which the driver would take the salesperson to a new location. This process was repeated until the end of the work day. At the end of the day, salespeople gave defendant Lane all the cash and checks they had collected, along with the sales receipts from that day. The crew would then travel to a motel, where defendant Lane would obtain rooms, which he assigned to the salespeople. Although defendant Lane obtained and signed for the motel rooms, he would debit the salespeople's accounts for this charge.

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Defendant Y.E.S./Lane imposed sales quotas on the salespeople. Each salesperson had a quota of seven subscriptions a day. These were discussed each day at a morning meeting led by defendant Lane.

Transportation was paid for and provided by defendant Y. E.S./Lane at no charge to the salespeople. Defendant Lane selected and hired defendant Jeremy Holmes as the van driver, and paid him one dollar for every order sold. Defendant Lane also assigned each salesperson to a particular vehicle and a particular seat in the vehicle for the day.

Defendant Lane decided what percentage of each sale would be credited to the salespeople. However, sales people were not paid every day. Instead, defendant Lane would keep a record of each person's sales and pay him or her periodically.

C. *The Van*

On January 16, 1999, defendant Heart of Texas, Dodge, Inc. entered into a Conditional Sale and Delivery Agreement with defendant Lane in regard to a 1998 Dodge Ram 3500. Lane presented a valid driver's license from the State of Iowa as well as a proof of insurance card from Allstate Indemnity Company. Defendant Lane made a down payment of $2500, after which defendant Heart of Texas delivered the van to him. Three days later, defendant Lane was approved for credit and financing by FirstCity Funding Corporation on January 19, 1999, for the balance of the van's purchase price.

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After January 16, 1999, defendant Heart of Texas never attempted to regain custody, control or possession of the vehicle. However, the van's certificate of title was never transferred from Heart of Texas to Lane because the full price was never paid.

Heart of Texas never had any contact with defendant Holmes or had any knowledge that he was driving the vehicle.

D. *The Accident*

On March 25, 1999, the members of the Y.E.S. sales crew, including Joseph Wild, were traveling southbound in the Heart of Texas van on Interstate 90 in Rock County, Wisconsin, returning from a day of door-to-door sales. When police began pursuing the van, which was exceeding the speed limit, the driver of the van, defendant Holmes, tried to switch seats with another passenger. In the attempt, he lost control of the vehicle and the van crashed. Seven passengers of the van were killed, including Joseph Wild, and the rest were injured.

JURISDICTIONAL FACTS

At the time of the accident, defendant Karleen Hillery lived in Oklahoma. She is currently domiciled in Illinois. She has never lived or worked in Wisconsin. The two sales crews that she managed, Kay's Naturals and Kay's Supernaturals, never sold magazines in Wisconsin. She has never entered into any contracts in Wisconsin relating to the sale of magazines.

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OPINION

A. *Summary Judgment Standard*

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex v. Catrett*, 477 U.S. 317, 324 (1986). All evidence and inferences must be viewed in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). However, the nonmoving party cannot rely on the allegations of the complaint alone but must set forth specific facts sufficient to raise a genuine issue for trial. *See Celotex*, 477 U.S. at 324. If no reasonable jury could render a verdict in favor of the non-moving party, the motion for summary judgment must be granted. *See id.* at 248.

B. *Motion for Summary Judgment of Karleen Hillery and Subscriptions Plus, Inc.*

1. *Personal jurisdiction over Karleen Hillery*

Karleen Hillery argues that she lacks the necessary minimum contacts with Wisconsin to allow a court in this state to exercise personal jurisdiction over her. Because she has never lived or been employed in Wisconsin, never entered into any contracts in Wisconsin relating to the sale of magazines, never personally sold magazines in Wisconsin, and none of the sales crews that she managed (Kay's Naturals and Kay's Supernaturals) sold magazines in Wisconsin, she contends that her contacts with the state are insufficient

to establish personal jurisdiction. Although defendant Hillery is the president of defendant Subscriptions Plus, Inc. and Subscriptions Plus has not objected to personal jurisdiction over it, defendant Hillery points out correctly that personal jurisdiction over a corporation cannot be the sole basis for jurisdiction over an officer. *See Pavlic v. Woodrum*, 169 Wis. 2d 585, 590, 486 N.W.2d 533, 534 (Ct. App. 1992).

Plaintiffs have the burden of establishing personal jurisdiction over defendant Hillery. *See Steel Warehouse of Wisconsin, Inc. v. Leach*, 154 F.3d 712, 714 (7th Cir. 1998). Therefore, although it is true that a corporate agent is not "shielded from personal jurisdiction if he, as agent of the corporation, commits a tortious act in the forum," *see Oxman's Erwin Meat Co. v. Blacketer*, 86 Wis. 2d 683, 692, 273 N.W. 2d 285, 289 (1979), plaintiffs bear the responsibility of demonstrating that the requirements of the Wisconsin long-arm statute were satisfied. They have not shown that defendant Hillery committed any tortious act within Wisconsin or that any other reason exists for subjecting her to personal jurisdiction. Accordingly, she will be dismissed from this case.

2. *Negligence claims against Subscriptions Plus*

In their complaint, plaintiffs alleged that defendant Subscriptions Plus breached its duty of care to Joseph Wild in the following ways: (a) failing to provide him with safe transportation; (b) failing to hire competent drivers to transport him; (c) allowing defendant Holmes to drive the van; (d) failing to properly supervise the drivers of the vehicle; and (e) committing "other acts of negligence."

(Although these claims were made against both defendants Subscriptions Plus and Hillery, I will refer to Subscriptions Plus only now that I have concluded that plaintiffs have not met their burden of establishing personal jurisdiction over defendant Hillery. Had I found her subject to personal jurisdiction, the discussion in this section would apply equally to the claims against her.) Defendant Subscriptions Plus contends that each of these claims must be dismissed because they fail as a matter of law.

First, defendant Subscriptions Plus argues that it can be determined as a matter of law that defendant Y.E.S./Choan Lane's relationship with defendant Subscriptions Plus was that of an independent contractor, and that defendant Subscriptions Plus cannot be held liable for the injuries of an independent contractor's employees. Second, defendant Subscriptions Plus contends that even if it cannot be determined as a matter of law that defendant Y.E.S./Lane was an independent contractor, plaintiffs' negligence claims must still be dismissed because Wisconsin's Worker's Compensation Act, Wis. Stat. §§ 102.01-102.89, would provide the exclusive remedy to the extent that Joseph Wild was an employee of defendant Subscriptions Plus. Therefore, regardless whether Joseph Wild had an employment relationship with defendant Subscriptions Plus or with defendant Y.E.S./Lane only, Subscriptions Plus argues, plaintiffs' negligence claims cannot survive summary judgment.

I conclude that it is unnecessary to determine the employment relationship among defendant Subscriptions Plus, defendant Y.E.S./Lane and Joseph Wild in order to

decide Subscriptions Plus's motion. Further, I conclude from the parties' proposed findings of fact that no reasonable jury could find defendant Subscriptions Plus liable for plaintiffs' injuries under a theory of negligence even if defendant Subscriptions Plus were Joseph Wild's employer.

a. Liability of Subscriptions Plus as an employer

Under Wis. Stat. § 102.03(2) worker's compensation is the exclusive remedy for injuries suffered by an employee when the conditions for liability under the Worker's Compensation Act are satisfied. *See Cohn ex rel. Schindell v. Apogee, Inc.*, 225 Wis. 2d 815, 819, 593 N.W.2d 921, 923 (Ct. App. 1999). Unless the statute does not apply, an injured employee is precluded from maintaining a negligence action against his employer. *See Weiss v. City of Milwaukee*, 208 Wis. 2d 95, 103, 559 N.W.2d 588, 592 (1997). Because the Worker's Compensation Act was intended to grant employers immunity from all tort liability arising from injuries to employees in exchange for absolute liability regardless of fault, the exclusive remedy provision applies to anyone seeking to recover from the employer as a result of an injury to an employee. *See Guse v. A.O. Smith Corp.*, 260 Wis. 403, 51 N.W.2d 24 (1952); *see also Franke v. Durkee*, 141 Wis. 2d 172, 413 N.W.2d 667 (Ct. App. 1987) (barring loss of consortium claim against employer brought by spouse of injured employee); *Larsen v. J.I. Case Co.*, 37 Wis. 2d 516, 520, 155 N.W.2d 666, 668 (1968) ("the sole liability of an employer because of the injury of an employee in the course of his employment, *either to the employee or to anyone else*, is under the Workmen's Compensation Law") (emphasis added); *Deluhery v. Sisters of St. Mary*, 244 Wis.

254, 12 N.W.2d 49 (1943) (barring loss of services claim against employer brought by father of injured employee). In this case, plaintiffs' action is based on the death of their son, so the exclusive remedy provision would apply to them if it would have applied to Joseph Wild, even though they have suffered their own distinct injuries. *See, e.g., York v. National Continental Insurance Co.*, 158 Wis. 2d 486, 495, 463 N.W.2d 364, 368 (Ct. App. 1990) (noting that worker's compensation benefits were parents' sole remedy against their child's employer after child was killed at work).

However, the exclusive remedy provision applies only if the conditions for liability under Chapter 102 are present. Under the act, an employer is liable if (1) the employee sustains an injury; (2) at the time of the injury, both the employer and employee are subject to the Worker's Compensation Act; (3) at the time of the injury, the employee is performing service growing out of and incidental to his or her employment; (4) the injury is not intentionally self-inflicted; and (5) the accident causing injury arises out of the employment. *See Weiss*, 208 Wis. 2d at 102, 559 N.W.2d at 591; Wis. Stat. §§ 102.03(1)(a)-(e). Whether these conditions are met and whether the exclusive remedy provision applies are questions of law. *See Weiss*, 208 Wis. 2d at 102, 559 N.W.2d at 591.

Assuming for the purpose of this discussion that Joseph Wild was an employee of defendant Subscriptions Plus (and therefore "subject to the provisions of this chapter"), the undisputed facts indicate that the conditions for liability under the act are present. Obviously, the first condition of injury is met. In regard to the second condition of coverage

under the act, an "employer" is defined as "[e]very person who usually employs 3 or more employees, whether in one or more trades, businesses, professions or occupations, and whether in one or more locations." Wis. Stat. § 102.04(I)(b)1. If members of the sales crew, which consisted of at least thirteen individuals, were employees of defendant Subscriptions Plus, then Subscriptions Plus would easily meet this requirement, and therefore be "subject to the provisions of this chapter, within the meaning of s. 102.03." Wis. Stat. § 102.04(1).

The third and fifth conditions would also be satisfied. Although Joseph Wild was not in the process of selling magazine subscriptions when the accident occurred, he was "performing service growing out of and incidental to" his employment. Wis. Stat. § 102.03(1)(f) makes this clear.

> Every employee whose employment requires the employee to travel shall be deemed to be performing services growing out of and incidental to the employee's employment at all times while on a trip, except when engaged in a deviation for private or personal purpose. Acts reasonably necessary for living or incidentally thereto shall not be regarded as such a deviation. Any accident or disease arising out of a hazard of such service shall be deemed to arise out of the employee's, employment.

See id. This provision establishes a presumption that an employee traveling on business is performing services arising out of and incidental to his or her employment at all times

until he or she returns unless the presumption is rebutted by evidence to the contrary. *See Wisconsin Electric Power Co. v. Labor and Industry Review Commission*, 226 Wis. 2d 778, 788, 595 N.W.2d 23, 27 (1999).

In the present case, Joseph Wild was traveling on business at the time of the accident. He and all members of the sales crew were returning from a day of door-to-door sales on the way to their hotel rooms, which would be obtained by Lane. This is not deviating "for a private or personal purpose," but rather is an act "reasonably necessary for living or incidental thereto." Therefore, Joseph Wild would have been both "performing service growing out of and incidental" to his employment and in an accident that "arose out of" his employment.

Finally, with regard to the fourth condition, Joseph Wild was injured in an accident in a vehicle he was not driving. No one suggests that his injury was intentionally self-inflicted. Therefore, if it were determined that Joseph Wild was in fact an employee of defendant Subscriptions Plus, each of the conditions of liability would be met and Chapter 102 would provide plaintiffs with their exclusive remedy.

The Worker's Compensation Act would also apply if Joseph Wild was an independent contractor in relation to defendant Subscriptions Plus. Wis. Stat. § 102.07(8)(a) provides:

> Except as provided in par. (b), every independent contractor is, for the purpose of this chapter, an employee of any employer under this chapter for

> whom he or she is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury.

Subsection (b) then goes on to list nine conditions, all of which must be met before an independent contractor is not considered an "employee" under the act. These need not be discussed in detail. It is clear that Joseph Wild does not meet all of them. For example, Wis. Stat. § 102.07(8)(b) requires that the independent contractor "[m]aintains a separate business with his or her own office, equipment, materials and other facilities," that he "[h]olds or has applied for a federal employer identification number," and that he "controls the means of performing the services or work." There is no evidence that Joseph Wild maintained a separate business, supplied his own facilities or had a federal employer identification. Furthermore, he did not control the means of performing the services; the large part of the sales crew's activities was directed by defendant Lane. Regardless whether Joseph Wild was an employee or an independent contractor, worker's compensation is plaintiffs' exclusive remedy against defendant Subscriptions Plus.

b. Liability of Subscriptions Plus as a non-employer

To the extent that defendant Subscriptions Plus was Joseph Wild's employer, plaintiffs' negligence claims would be precluded. However, Chapter 102 does not bar claims against a person who had no employment relationship with the one injured. *See Estate of Thompson v. Jump River Electric*, 225 Wis. 2d 588, 593, 593 N.W.2d 901, 904 (Ct. App. 1999); *Wagner v. Continental Casualty Co.*,

143 Wis. 2d 379, 385, 421 N.W.2d 835, 837 (1988); *see also* Wis. Stat. § 102.29(1) ("The making of a claim for compensation against an employer . . . for the injury or death of an employee shall not affect the right of the employee, the employee's personal representative, or other person entitled to bring action, to make a claim or maintain an action in tort against any other party for such injury or death.") It remains to be determined whether, on the basis of the undisputed facts, defendant Subscriptions Plus could be held liable to plaintiffs if defendant Y.E.S./Lane was only an independent contractor and, consequently, Joseph Wild was an employee of defendant Y.E.S./Lane rather than of defendant Subscriptions Plus.

The general rule is that one who contracts with an independent contractor is not liable for the torts of the independent contractor. *See Snider v. Northern States Power Co.*, 81 Wis. 2d 224, 232, 260 N.W.2d 260, 263 (1977). However, commentators have observed that the general rule "has been eroded by so many well-recognized exceptions that the rule is now primarily important as a preamble to the catalogue of its exceptions." 41 Am. Jur. 2d; *Independent Contractors* § 29, at 429 (1995).

One exception to the general rule of nonliability in Wisconsin is a situation in which the principal employer has a non-delegable duty to the employees of the independent contractor. In such a situation, the principal employer is vicariously liable for the tortious conduct of the independent contractor. *See Brooks v. Hayes*, 133 Wis. 2d 228, 233, 395 N.W.2d 167, 169 (1986). The idea of a non-delegable duty rests on the premise that some responsibilities are so important that the risks of performance cannot be bargained

away. *See Estate of Thompson*, 225 Wis. 2d at 595, 593 N.W.2d at 905. The duty may be imposed by statute, contract, franchise or charter, or common law. *See id.*

I am not aware of any statute that would impose a non-delegable duty on defendant Subscriptions Plus in this situation. It is clear that defendant Subscriptions Plus did not assume through its contract with defendant Y.E.S./Lane a duty to provide safe transportation, to insure the hiring of competent drivers or to supervise the drivers of the van. In fact, the "Independent Distributor Agreement" that defendant Subscriptions Plus had with defendant Y.E.S./Lane states expressly that the "[d]istributor . . . is solely responsible for the operation and conduct of agents, contractors, solicitors, or representatives."

Although Wisconsin common law imposes a non-delegable duty upon the principal employer under circumstances involving employment that is an "abnormally dangerous activity . . . in which the risk of harm remains unreasonably high no matter how carefully it is undertaken," *See Estate of Thompson*, 225 Wis. 2d at 595, 593 N.W.2d at 905 (internal quotations omitted), neither selling magazine subscriptions nor driving a van is an "abnormally dangerous activity." Cf. *Lofy v. Joint School District #2, City of Cumberland*, 42 Wis. 2d 253, 263, 166 N.W.2d 809, 813-14 (1969) (holding that operation of bus not inherently dangerous for purpose of non-delegable duty). Therefore, defendant Subscriptions Plus cannot be held liable as the result of a nondelegable duty.

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Wisconsin common law would also impose vicarious liability on defendant Subscriptions Plus if the doctrine of apparent authority applies. *See Pamperin v. Trinity Memorial Hospital*, 144 Wis. 2d 188, 203, 423 N.W.2d 848, 854 (1988). In *Pamperin*, the court stated:

> Under apparent authority, a principal may be held liable for the acts of one who reasonably appears to a third person, through acts by the principal or acts by the agent if the principal had knowledge of those acts and acquiesced in them, to be authorized to act as an agent for the principle . . . For liability to exist, three elements must be present: (1) Acts by the agent or principal justifying belief in the agency; (2) knowledge thereof by the party sought to be held; (3) reliance thereon by the plaintiff, consistent with ordinary care and prudence.

See id. Although some members of the sales crew believed they were employed by defendant Subscriptions Plus, there are no facts suggesting that Joseph Wild or plaintiffs believed that defendant Y.E.S./Lane was an agent of defendant Subscriptions Plus or, if they did, that they relied on such a belief in any way. Therefore, defendant Subscriptions Plus cannot be held liable because of apparent authority.

Finally, defendant Subscriptions Plus could be liable to plaintiffs for the acts of an independent contractor if defendant Subscriptions Plus committed an affirmative act of negligence. Under this exception, a principal employer may be liable to the employees of an independent contractor

if the principal employer commits "an affirmative act of negligence which increased the risk of injury." *Wagner*, 143 Wis. 2d at 389, 421 N.W.2d, at 839 (quoting *Barth v. Downey Co., Inc.*, 71 Wis. 2d 775, 783, 239 N.W.2d 92, 96 (1976)). However, the principal employer cannot be held liable for only "passive inaction or a failure to take steps to protect the plaintiff from harm." *Wagner*, 143 Wis. 2d at 389, 421 N.W.2d at 839 (internal quotations omitted). Examples of "passive" acts include negligent hiring, *see id.* at 390, 421 N.W.2d at 839, and failing to discover and act on safety violations of the independent contractor, *See Estate of Thompson*, 225 Wis. 2d at 601, 593 N.W.2d at 907. Because all of plaintiffs' allegations involve "failures" (failure to supervise, failure to provide safe transportation, failure to hire a competent driver, failure to stop Holmes from driving), they could not be considered "active misconduct constituting an affirmative act." *Wagner*, 143 Wis. 2d at 389, 421 N.W.2d at 839.

On the basis of the undisputed facts, then, if defendant Y.E.S./Lane was determined to be an independent contractor, defendant Subscriptions Plus could not be held liable for defendant Y.E.S./Lane's tortious conduct. Of course, this does not mean that Subscriptions Plus would not be liable for its *own* tortious conduct against plaintiffs. *See* 41 Am. Jur. 2d, *Independent Contractors* § 30, at 429 (1995) ("Although one who employs an independent contractor may escape liability for such contractor's negligence, the employer is nevertheless answerable for its own negligence.") As noted above, plaintiffs alleged in their complaint that Subscriptions Plus had failed to hire a competent driver. If Subscriptions Plus had retained control over the selection of the van driver,

Subscriptions Plus could be found to be negligent in this regard and potentially liable to plaintiffs for the death of their son. *See United States Fidelity Guaranty v. Frantl Industries*, 72 Wis. 2d 478, 487, 241 N.W.2d 421, 426 (1976) (citing *Restatement (Second) of Torts* §§ 410, 414) (stating that principal employer liable for own negligence when it orders certain performances or retains control of certain aspects). However, the undisputed facts are that defendant Subscriptions Plus did not direct defendant Y.E.S./ Lane to choose defendant Holmes as the driver but rather lacked any involvement in the decision.

Plaintiffs alleged that defendant Subscriptions Plus was negligent in allowing defendant Holmes to drive the van, suggesting a negligent entrustment claim. Such a claim would not depend on an employment relationship between defendants Subscriptions Plus and Y.E.S./Lane or the sales crew, but would require only satisfaction of the elements for negligent entrustment. Courts in Wisconsin have adopted two theories of negligent entrustment. First, under *Restatement (Second) of Torts § 308*, "liability can arise when any person . . . who has a vehicle under his control permits another to use the vehicle if he knows, or should know that the other is unable to manage the vehicle and, therefore, injury to others is likely to result." *Bankert v. Threshermen's Mutual Insurance Co.*, 110 Wis. 2d 471, 476, 329 N.W.2d 150, 153 (1983). In addition, a person who "supplies" a piece of property may be liable for negligent entrustment if the supplier should have known that because of "youth, inexperience, or otherwise," the person to whom he gave, lent or sold the property would "use it in a manner involving unreasonable risk of harm to others whom the supplier should

expect to share in or be endangered by its use." *Restatement (Second) of Torts § 390* (adopted by *Halverson v. Halverson*, 197 Wis. 2d 525, 530, 541 N.W.2d 150, 153 (Ct. App. 1995)).

Plaintiffs have failed to establish a prima facie case of negligent entrustment because they have failed to adduce any evidence that the van defendant Holmes was driving was either under the control of defendant Subscriptions Plus or supplied by it. The undisputed facts show that the van was obtained from defendant Heart of Texas Dodge, Inc. and purchased by defendant Lane. Therefore, plaintiffs' negligent entrustment claim fails as a matter of law.

In sum, even when the facts are viewed in the light most favorable to plaintiffs, no reasonable jury could find in their favor on their negligence claims. To the extent that Joseph Wild was employed directly by defendant Subscriptions Plus, plaintiffs' exclusive remedy would be under worker's compensation. Alternatively, to the extent that defendant Y.E.S./Lane was an independent contractor of defendant Subscriptions Plus and Joseph Wild was employed by defendant Y.E.S./Lane, defendant Subscriptions Plus cannot be held liable for the tortious acts of its independent contractor. Finally, the undisputed facts do not show that defendant Subscriptions Plus's own negligence contributed to the accident. Accordingly, defendant Subscription Plus's motion for summary judgment will be granted with respect to plaintiffs' negligence claims.

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3. *Breach of agreement claim*

In Count Four of plaintiffs' complaint, they allege that defendant Subscriptions Plus "breached [its] agreement to provide Joseph Donald Wild with safe transportation." Because there is no evidence in the parties' proposed findings of fact that defendant Subscriptions Plus and Joseph Wild ever entered into such an agreement, defendant Subscription Plus's motion for summary judgment in regard to this claim must be granted as well.

C. *Acceptance Insurance Companies' Motion for Summary Judgment*

The motion filed by defendant Acceptance Insurance Companies for summary judgment is based on the contention that although Acceptance was the insurer of defendants Subscriptions Plus and Karleen Hillery, the policy it issued did not cover this accident. Thus, defendant Acceptance argues, it cannot be held liable to plaintiffs because it has no duty to indemnify defendant Subscriptions Plus or defendant Hillery. Because the motion for summary judgment filed by defendant Subscriptions Plus will be granted in all respects, defendant Acceptance's motion is moot. There can be no duty to indemnify without liability on the part of the insured. Accordingly, defendant Acceptance's motion will be denied as moot.

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D. *The Motion for Summary Judgment of Heart of Texas Dodge, Inc. and Universal Underwriters of Texas*

Plaintiffs alleged in their complaint that defendant Heart of Texas Dodge, Inc. did not actually sell a van to defendant Lane on January 16, 1999, but instead entered into a "Conditional Sale and Delivery Agreement" that was never completed. Therefore, plaintiffs alleged, defendant Heart of Texas owned and controlled the van at the time of the accident and can be held liable for "[n]egligently entrusting the Vehicle to persons who were not fit or qualified to drive the vehicle in a safe manner." Plfs.' Cpt., dkt. # 19, at ¶ 26. In addition, plaintiffs alleged that the insurance policy defendant Heart of Texas purchased from defendant Universal Underwriters of Texas provided coverage for the accident.

In their brief supporting their motion for summary judgment, defendants Heart of Texas and Universal raise the following contentions: (1) defendant Universal's insurance policy does not provide coverage for the accident; (2) defendant Heart of Texas cannot be held liable for negligent entrustment because it did not own the van at the time of the accident; (3) there is insufficient evidence for a reasonable jury to hold defendant Heart of Texas liable for negligent entrustment; and (4) holding defendant Heart of Texas liable would be against Wisconsin public policy and a violation of the contract clause of the Constitution. Because I conclude that the parties have failed to adduce sufficient evidence to allow a reasonable jury to conclude that defendant Heart of Texas is liable for negligent entrustment, it is unnecessary to address the other arguments of defendants Heart of Texas and Universal.

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As noted above, Wisconsin recognizes two theories of negligent entrustment. One who has a vehicle under her control, *See Bankert*, 110 Wis. 2d at 476, 329 N.W.2d at 153, and one who "supplies" a piece of property may be liable for negligent entrustment. *See Halverson*, 197 Wis. 2d at 530, 541 N.W.2d at 153. Under either theory, whether the defendant is alleged to have controlled the vehicle or merely supplied it, a plaintiff must establish that the alleged tortfeasor knew or should have known that the entrustment would create an unreasonable risk of harm to others.

As defendants Heart of Texas and Universal observe, neither the Supreme Court of Wisconsin nor the Wisconsin Court of Appeals has addressed the question whether a claim for negligent entrustment can be established in the context of a vehicle sale. Defendants Heart of Texas and Universal ask this court to issue a per se rule that a claim for negligent entrustment cannot be predicated on the sale of a vehicle, even where the sale is conditional in nature. I will leave that issue to be decided by the state courts of Wisconsin because its resolution is unnecessary to the determination of this motion. Even if a negligent entrustment claim could be based on a conditional sale, the elements of negligent entrustment have not been met in this case. There are no facts proposed that would suggest defendant Heart of Texas either knew or should have known that Lane intended to use the vehicle in a way that would create an unreasonable risk of harm to others or that he was likely to do so.

First, plaintiffs did not allege in their complaint that defendant Heart of Texas had any involvement in selecting defendant Holmes as the van driver or that defendant Heart

of Texas knew that defendant Lane would choose someone without a license to drive the van. Furthermore, no facts have been proposed that would suggest defendant Heart of Texas should have known that defendant Lane would use the vehicle in a way that would create an unreasonable risk of harm to others. When defendant Lane obtained the vehicle from defendant Heart of Texas, he had a valid driver's license issued by the State of Iowa and proof of insurance from Allstate Insurance Company. In short, there was no reason for defendant Heart of Texas to conclude that the vehicle would be used negligently. Accordingly, the motion for summary judgment filed by defendants Heart of Texas and Universal will be granted.

ORDER

IT IS ORDERED THAT

1. The submissions filed by plaintiffs Donald R. Wild and Diana H. Wild in response to the motions for summary judgment filed by defendants Karleen Hillery, Subscriptions Plus, Inc., Acceptance Insurance Companies, Heart of Texas Dodge, Inc. and Universal Underwriters of Texas are STRICKEN as untimely.

2. Plaintiffs' motion to enlarge the time for filing is DENIED.

3. The motion for summary judgment filed by defendant Karleen Hillery is GRANTED.

4. The motion for summary judgment filed by defendant Subscriptions Plus is GRANTED with respect to plaintiffs' breach of agreement and negligence claims against this defendant.

5. Defendant Acceptance Insurance Companies' motion for summary judgment is DENIED as moot.

6. The motion for summary judgment filed by defendants Heart of Texas Dodge, Inc. and Universal Underwriters of Texas is GRANTED.

7. Defendants Karleen Hillery, Acceptance Insurance Companies, Heart of Texas Dodge, Inc. and Universal Underwriters of Texas are DISMISSED from this case.

Entered this 6th day of December, 2000.

BY THE COURT:

s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge